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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 90

LEE H. BENSLER, Individually, Now residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, Petitioner

vs.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, a National Bank at Memphis, Tennessee, et al., etc.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1948
CERTIORARI GRANTED OCTOBER 11, 1948

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 90

LIPE HENSLEE, Individually, Now residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, *Petitioner*,

vs.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, a National Bank at Memphis, Tennessee, *et al.*, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 In the United States District Court
For the Middle District of Tennessee.
(File Endorsement Omitted.)

No. 760

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, A National Bank at Memphis, Tennessee, and WILBURN K. NOELL, a Resident Citizen of Memphis, Tennessee, Executors of the Estate of William Bate Williams

Appellants-Plaintiffs

v.

LIPE HENSLEE, Individually, Now Residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee

Defendant-Appellee

Complaint—Filed October 8, 1946

For their cause of action the plaintiffs respectfully show the Court:

I.

That on July 22nd, 1943, William Bate Williams, a resident citizen of Shelby County, Tennessee, died, leaving a last will and testament, and your plaintiffs were duly
2 appointed executors of said last will and testament on July 30, 1943, by the Probate Court of Shelby County, Tennessee, and after having qualified, letters testamentary were duly issued to them. A copy of said letters testamentary and last will and testament are attached herewith, marked Exhibit "A".

The defendant, Lipe Henslee, was appointed Collector of Internal Revenue for the State of Tennessee on the 17th day of April, 1944, and has acted as such continuously since that date and was at all times the Collector of Internal Revenue during the period hereinafter mentioned in this complaint.

II.

Your plaintiffs now show that after having made careful surveys and inventories of said estate they determined and estimated that the gross value thereof was $508,411.17, and that the necessary expenses would reduce said estate to a net value of $426,899.10.

Your plaintiff now shows the Court that Item VI of said last will and testament of William Bate Williams,

Deceased, is a residuary clause, which bequeaths the balance of the estate, after paying certain specific bequests, to four corporations, operated exclusively for charitable purposes: Mary Galloway Home for Aged Women, Crippled Children's Hospital School, The Home for Incurables and Sunshine Home for Aged Men, all charities under the laws of Tennessee, and located in the City of Memphis.

On the 26th day of October, 1944, your plaintiffs, as executors, filed the Federal Estate Tax return for said estate with the defendant as Collector of Internal Revenue at Nashville, setting out the net taxable value of said estate in the sum of $305,029.85, after deducting the value of the above mentioned charitable bequests in the sum of $121,869.20.

3 Your plaintiffs aver that said deductions for charitable bequests are made pursuant to Section 812 (d) of the Internal Revenue Code.

Your plaintiffs aver that the said bequests have a present ascertainable value, and there is no uncertainty appreciably greater than the general uncertainty which attends human affairs.

On the 9th day of March, 1945, the Collector of Internal Revenue made a deficiency assessment against said estate in the sum of $1,920.61, and thereupon your plaintiffs, as executors, paid said tax, including said deficiency assessment without protest, and your plaintiffs now aver that said payment was proper and legal, and a full payment of the amount of estate tax due.

Your plaintiffs now aver and show, however, that on August 10, 1945, an additional deficiency assessment was made against your plaintiffs as executors of said estate in the sum of $33,081.52, and as a basis for said deficiency assessment the Collector of Internal Revenue disallowed the charitable bequests deducted on the Federal Estate tax return filed, on the ground that Item III of the said last will and testament was such as to allow the life beneficiary, to-wit: Elizabeth Bate Williams, the mother of the Deceased, to encroach on the corpus of the estate. A copy of said notification is herewith attached marked Exhibit "B".

On September 6, 1945, within the time allowed by law your plaintiffs filed a sworn protest to said deficiency assessment with the defendant, Lipe Henslee, the Collector of Internal Revenue, at Nashville, Tennessee. A copy of said protest, which sets forth both the facts and the law, is herewith attached, marked Exhibit "C".

On September 26, 1945, the defendant, Lipe Henslee, as Collector of Internal Revenue, overruled said pro-
4 test and thereupon your plaintiffs requested an oral hearing on said protest, which was granted, and after several postponements said protest held in the office of the Collector of Internal Revenue on March 19, 1946, at which time the overruling of said protest was duly affirmed and the deficiency assessment was approved.

Your plaintiffs show that the original Federal Estate tax of $62,368.62, together with the small deficiency tax, was duly and properly paid.

Your plaintiffs now show that after taking the necessary steps to protest the deficiency assessment tax they paid into the hands of your defendant the sum of $35,899.12, which consisted of the deficiency assessment tax of $33,081.52, together with interest thereon of $2,817.60.

Your plaintiffs aver that on April 18, 1946, on Form 843 of the Treasury Department they filed a claim for a refund of said amount. On August 14, 1946, said claim for refund was denied by the Commissioner of Internal Revenue. A copy of the notice of said denial is herewith attached, marked Exhibit "D".

Your plaintiffs aver that the said deficiency assessment which disallowed the charitable deductions was illegal and that the payment by your plaintiffs of said sum in full of said deficiency tax was illegal and wrongful and that the defendant, Lipe Henslee, has in his hands said sum, which he is wrongfully and illegally withholding.

Your plaintiffs, therefore, have filed this suit in order to recover said sum of $35,899.12; with interest thereon until said sum is paid.

III.

Your plaintiffs now aver that said assessment and the deficiency tax imposed thereon was illegal and,
5 therefore, said tax was wrongfully collected upon the following grounds:

1. There is no reasonable human possibility that the beneficiary, Elizabeth Bate Williams, the mother of the deceased, would have at any time encroached on the corpus of this estate, and, therefore, a proper survey of said estate plainly shows that there was a reasonably and fixed standard by which the value of the charitable bequests could be ascertained. In this connection your plaintiffs show

(a) That the said Elizabeth Bate Williams is now eighty-eight years of age, with a life expectancy of approx-

imately three years. That she has no dependents and no close relatives whatsoever.

(b) That she has an independent estate of her own of approximately the value of $100,000.00.

On June 15, 1945, she purchased from your executors a building located at 45 Union Avenue, City of Memphis, for $30,000.00 cash, which yields her a net income of approximately $200.00 per month. That in addition to this she owns her own home in Memphis and a summer home at Monteagle, Tennessee.

(c) The said Elizabeth Bate Williams, therefore, has an income of approximately $250.00 to $300.00 per month over and above the $750.00 per month provided in the will. That in December, 1944, your executors paid her the sum of $16,500.00 in cash in settlement of a claim against the estate; that her mode of living is simple and economical and has not changed materially from her manner of living prior to the death of the testator, nor since the death of the testator. She has made no request or demand of any character for additional funds over and above the said $750.00. The actual living expenses of Mrs. Williams are considerably less than $750.00 per month and she has been steadily saving additional sums out of this amount.

6 IV.

Your executors now show that at the time of the death of the testator a reasonable survey of his estate showing its value and the income which it was then producing and would produce in the future showed that there would be a very considerable excess in income over and above the $750.00 required to be paid to the mother of the testator.

Your executors now show that this has been demonstrated by the passage of time and that during the more than three years since the death of the testator the estate has yielded a net income of approximately $15,000.00 per annum after charging off all expenses, with the result that there is an excess income of more than $6,000.00 per annum, which has accumulated. There is now on hand more than $18,000.00 of accumulated income which would have to be exhausted before any encroachment on the corpus of the estate.

Your plaintiffs aver that the statement contained in the denial of the claim for refund dated August 14, 1945,

to the effect that the funds to be expended for the life beneficiary cannot be reliably determined and that no fixed standard governing the amount of funds for the requirement of the life beneficiary is not correct. On the contrary your plaintiffs now aver that the value of the charitable bequests can and was reliably determined by your plaintiffs and that there is a fixed standard by which this value was ascertained.

Your plaintiffs, therefore, aver that there was no possibility that the life beneficiary would ever invade the corpus of the estate. Your plaintiffs as executors carefully examined these facts immediately after the death of the testator and now show the Court that in making the deductions for the charitable bequests they were governed by this fixed standard and that the excess tax levied on the charitable bequests was illegal.

7 Your plaintiffs, therefore, again aver that the payment of the said sum of $35,899.12 was illegal and that the defendant, Lipe Henslee, is now holding said sum in his hands and is liable personally to your plaintiffs for the return thereof, together with interest until said amount is actually paid.

WHEREFORE, your plaintiffs bring this suit for the sum of $40,000.00, and ask that judgment be rendered against the said Lipe Henslee for said amount.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Union & Planters National Bank & Trust Company, and Milburn K. Noell, Executors of the Estate of William Bate Williams,
1905 Sterick Building,
Memphis, Tennessee.

WARING, WALKER & COX,
Of Counsel.

8 *Duly sworn to by R. N. Lloyd.*
Jurat omitted in printing. (*All in italics.*)

Issue and service of summons are waived and receipt of a copy of the foregoing complaint is hereby acknowledged, this October 8, 1946.

HORACE FRIERSON,
U. S. Attorney.

9 *Exhibit "A"—Filed October 8, 1946*

LETTERS TESTAMENTARY

(File Endorsement Omitted.)

State of Tennessee, }
Shelby County. } ss.:

To Union Planters National Bank & Trust Company and Milburn K. Noell

It appearing to the Probate Court now in session, that William Bate Williams has died, leaving a WILL, and the Court being satisfied as to your claim to administration, and you having qualified as directed by law, and the Court having ordered that Letters Testamentary be issued you without bond.

THESE ARE, THEREFORE, to authorize and empower you to take into your possession and control all the goods, chattels, claims and papers of said testate, and return a true and perfect inventory thereof to our next Probate Court; to collect and pay all debts, and to do and transact all the duties in relation to said estate which lawfully devolve on you as Executors, and after having settled up said estate, to deliver the residue thereof to those who are by law entitled.

WITNESS MARVIN POPE, Clerk of Said Court, at office, this 30 day of July, 1943.

MARVIN POPE,
Clerk.
By TOM B. CRENSHAW D.C.

(L. S.)

10 State of Tennessee, }
Shelby County. } ss.:

I, John W. McGoldrick, Clerk of the County and Probate Courts of said County, do hereby certify that the foregoing one page contains a full, true and perfect copy of the Letters Testamentary issued to Union Planters National Bank & Trust Company and Milburn K. Noell as executors of the estate of William Bate Williams deceased as the same appears in record in Executor's Bond Record No. 15 page 128 now on file in my office, and that same still remain in full force and effect.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of Memphis, this 24th day of September, 1946.

MARVIN POPE,
Clerk.
By LUCILLE BARR D.C.

(SEAL)

11 LAST WILL AND TESTAMENT OF WILLIAM BATE WILLIAMS

I, William Bate Williams, being of sound mind and disposing memory, do make and publish this my last will and testament, revoking all others heretofore made by me.

Item I.

I wish all of my just debts paid.

Item II.

I hereby nominate Milburn K. Noell and the Union Planters National Bank and Trust Company of Memphis, Tennessee, as executors of this my last will and testament, and likewise I appoint them as trustees to administer and manage my estate during the lifetime of my mother, Elizabeth Bate Williams, as hereinafter set forth.

The said executors and trustees are to act jointly in all matters and are excused from giving any bond but are to make their legal settlements to the Probate Court of Shelby County, Tennessee, in accordance with the Tennessee laws.

In the event it is necessary to have an executor appointed in the State of Arkansas I hereby nominate and appoint Charles W. Norton of Forrest City, Arkansas, and the said Milburn K. Noell solely as executors of my personal estate in Arkansas and as ancillary executors of my estate in Tennessee. On final disposition of my estate in Arkansas the said executors are to make final settlement with the executors and trustees in Tennessee heretofore named.

12 I further direct that Sam P. Walker be employed by my executors and trustees as the attorney to look after and attend to all legal matters of my estate and the trust hereinafter created.

Item III

I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noell and the Union Planters National Bank and Trust Company, as trustees, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred.

I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty (750:00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient

to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

13 I further authorize my said executors and trustees to use any insurance which may be made payable to my estate for immediately providing for my mother.

Item IV

I hereby direct, authorize and empower my executors and trustees to sell and otherwise dispose of all of my real estate and tangible personal property, wheresoever located, within two years from my death upon such terms as they deem best; and I hereby empower my executors and trustees to convey an absolute unconditional title to any such property, either real or personal. The proceeds of such sales are to be reinvested in such securities as my executors and trustees deem best, but not in real estate.

I further direct that all stocks, bonds, notes, mortgages, choses in action and other securities which I possess at the time of my death are to remain as then invested. However, my said executors and trustees are hereby empowered and authorized at any time to sell any securities which were on hand at my death or in which they may have invested when in their judgment the investment is not reasonably safe or the return is not adequate. In selling any real and personal property or in making any sales of any character herein authorized, the purchasers are not required to look to or be responsible for the proceeds of such sales.

My executors and trustees furthermore are not required to either hold any securities or reinvest in any securities in accordance with the statutes of the State of Tennessee or any other State, but are to invest and manage same according to their best judgment and in their sound dis-

cretion and they are not to be held personally liable if they do so. The purpose of this provision is to leave my executors and trustees free to exercise their sound discretion notwithstanding any legal or statutory requirement as to investments by either executors or trustees.

14 *Item V*

Upon the death of my mother I hereby direct my executors and trustees to convert my entire estate as it then exists into cash within one year.

I hereby will and bequeath all of my property, that is all of my estate, after my mother's death to be distributed in cash as follows:

(a) To my cousin, William Tyree Bate of Gallatin, Tennessee, twenty-five (25%) percent of my entire estate as it exists at the date of my mother's death. If he should die before I do, or before the death of my mother, said amount is to be paid to his daughter, Julia Tyree Bate, her heirs or next of kin.

As hereinafter provided, this bequest is to be tax free; and to arrive at the amount to be paid hereunder my executors and trustees are to add to the value of my estate at my mother's death the full amount of all State and Federal inheritance taxes paid after my death and twenty-five (25%) percent of the total amount so arrived at is to be considered the amount of this bequest.

(b) To Sam P. Walker, Jr., the son of my friend Sam P. Walker, the sum of Twenty Thousand ($20,000.00) Dollars, and in the event he should die before my death, or the death of my mother, said legacy is to go to his heirs or next of kin and is not to lapse.

(c) To Margaret Gunther and Harry Gunther, the children of my friend John George Gunther, the sum of Ten Thousand ($10,000.00) Dollars each, and in the event either should die before my death, or the death of my mother, the legacy to the deceased is to go to his or her heirs and next of kin and is not to lapse.

(d) To Frank T. Donelson, Jr., the son of my friend,
Frank T. Donelson, the sum of Twenty Thousand
15 ($20,000.00) Dollars, and in the event he should die
before my death, or the death of my mother, said legacy is to go to his heirs and next of kin and is not to lapse.

(e) To Leo G. Carter the sum of Twenty Thousand ($20,000.00) Dollars, but if the said Leo G. Carter should die before my mother, the said Twenty Thousand ($20,-

000.00) Dollars shall be equally divided between the legatees of their heirs and next of kin named in paragraphs (a), (b), (c) and (d).

(f) To Laura H. Venn, the widow of Dr. Joe H. Venn, a friend of my mother, the sum of Twenty Thousand ($20,000.00) Dollars, but if the said Laura H. Venn should die before my mother, the said Twenty Thousand ($20,000.00) Dollars shall be equally divided between the legatees or their heirs and next of kin named in paragraphs (a), (b), (c) and (d).

(g) To my cousin, Kate G. Galbreath, the widow of Percy Galbreath, the sum of Ten Thousand ($10,000.00) Dollars, and if she should die before the death of my mother said legacy is to be paid to her heirs and next of kin and is not to lapse.

(h) To the Mary Latham Chapter of the Daughters of the Confederacy the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

(i) To the Elizabeth Bate Williams Chapter of the Daughters of the Confederacy the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

(j) To Miss Bessie Davis, my cousin and my mother's devoted friend, of Nashville, Tennessee, the sum of Five Thousand ($5,000.00) Dollars.

I direct that my executors and trustees pay from my residuary estate all estate, inheritance, legacy or succession taxes on account of the transfer and receipt of the
16 foregoing bequests so that the legatees above will receive their legacies tax free. If there are not sufficient funds on hand at the time of my mother's death to pay all of the legacies above set forth, then I direct that the legacy in paragraph (a) be computed and paid as set forth in said paragraph and that the other legacies be reduced on a pro rata basis.

Item VI

After the death of my mother and after the payment of all of the legacies above set forth, and after the payment of all taxes, expenses of administration and the expenses of this trust, I hereby direct my said executors and trustees to pay the balance of my estate after the same has been converted into cash as herein provided as follows: to the Mary Galloway Home for Aged Women, The Crippled Children's Hospital School, at present located at 2009 Lamar Avenue, The Home for Incurables Founded by the King's Daughters and Sons of Tennessee, and the

Sunshine Home for Aged Men, all located in Memphis, Tennessee, equally, share and share alike. This is a residuary bequest, however, and is not to infringe on any of the other legacies hereinbefore provided.

Item VII

In the event my mother should predecease me the trusteeship hereinbefore set forth would be unnecessary and I hereby authorize and empower the executors herein named to distribute my estate as herein set forth with exactly the same full powers granted to my executors and trustees.

I have hereby nominated and named the same parties both as executors and as trustees of my estate, and as such I hereby authorize my executors to deliver and transfer to the said trustees all of my estate which comes into their hands as executors regardless of any law to the contrary, and a receipt to the said executors by said trustees shall be a receipt in full for all purposes, including the settling of my estate by said executors in any court.

17 In the event Mr. Milburn K. Noell should predecease me or should die before the death of my mother, I hereby direct that no executor or trustee shall be appointed in his stead, but all the powers hereby jointly vested in my executors and trustees shall be exercised by the remaining executor and trustee, Union Planters National Bank and Trust Company.

In witness whereof I have hereunto set my hand at Memphis, Tennessee, this 27th day of March, 1942.

(Sgnd) William Bate Williams.

Signed by the said William Bate Williams, as and for his last will and testament, in the sight and presence of us, the undersigned, who, at his request, and in his sight and presence and in the sight and presence of each other, have subscribed our names hereto as attesting witnesses the day and date above written.

F. T. Donelson,
Chester Lowrance,
Ivan V. Massengill.

19 *Exhibit "B"—Filed October 8, 1946*

(File Endorsement omitted)

Estate of William Bate Williams

1.

Statement—August 10, 1945

	Assessed	Deficiency	Total Liability
On return	$60,448.01	$33,081.52	$95,450.14
On waiver	1,920.61		
Totals	$62,368.62	$33,081.52	$95,450.14

Adjustments to Net Estate

Net estate for basic tax RAR 3/7/45	$212,043.80
Add: Deduction for charities disallowed	114,855.30
Net estate for basic tax as adjusted	$326,899.11
Net estate for additional tax as adjusted	$366,899.11

Deduction for charity is denied on the following grounds:

(a) Article III of decedent's will which says:

"I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noel and the Union Planters National Bank and Trust Company, as Trustees, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred,

"I hereby direct both my executors and my trustees to pay to my said mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the
20 estate to pay said amount and to sell any of my property, real or personal, for this purpose.

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this

trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose."

(b) Under Section 81.46 of Regulations 105, it is stated that

"Conditional bequests—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

"If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

(c) Renunciation of the previous contained in said Article III of decedent's will was not timely.

Recomputation of Tax

Basic Tax:			
On first block	$250,000	$6,500.00	
On bal. $76,889.11 @ 4%		3,075.96	
Total		$9,575.96	
Less: 80% credit for State Inh. Tax		7,660.77	
Net			$1,915.19
Addition tax:			
On first block of $250,000		$65,700.00	
On bal. $116,969.10 @ 32%		37,410.91	

Less Gross Basic Tax	$103,110.91 9,575.96	
		$93,534.95
Total liability		95,450.14
Less: Tax paid with return	$60,488.01	
Tax paid on waiver	1,920.61	
		62,368.62
Deficiency		$33,081.52

23 *Exhibit "C"—Filed October 8, 1946*

(File Endorsement Omitted.)

To: Collector of Internal Revenue
Nashville, Tennessee

Attention: Mr. Marsh T. Polk
Reference—M. T.-E. T. 2945.

Estate of Williams,
Memphis, Tennessee—
Date of Death
July 22, 1943.

ESTATE OF WILLIAM BATE WILLIAMS

Protest of Additional Federal Estate Tax Assessment of August 10, 1945

We, the undersigned, Union Planters National Bank & Trust Company, Executor of the William Bate Williams Estate, deceased July 22, 1943, and Sam P. Walker, Attorney for Estate, Executors and Trustees, hereby file in triplicate their sworn formal protest of the deficiency assessment of Federal Estate Tax in the above estate, amounting to $33,081.52, as contained in your letter of notification, dated August 10, 1945.

The original return was filed with you in August, 1944. The return was carefully checked by your Revenue Department, and in March, 1945, a small deficiency assessment of $1,920.65 was made against this estate. It was our understanding that in agreeing to this deficiency and paying same the return as made would then be acceptable as rendered.

24 Your recent additional deficiency assessment of August 10, 1945, concerns the question of the allowance of the amount for named charitable bequest deductions made in the original return. The amount disallowed by you was $114,855.30.

The will provides as follows:

"(a) Article III of decedent's will which says:

"I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noell and the Union Planters National Bank and Trust Company, as trustee, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred.

"I hereby direct both my executors and my trustees to pay to my said mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose." .....

25 "After the death of my mother and after the payment of all of the legacies above set forth, and after the payment of all taxes, expenses of administration and the expenses of this trust, I hereby direct my said executors and trustees to pay the balance of my estate after the same has been converted into cash as herein provided as follows: to the Mary Galloway Home for Aged Women,

the Crippled Children's Hospital School, at present located at 2009 Lamar Avenue, The Home for Incurables Founded by the King's Daughters and Sons of Tennessee, and the Sunshine Home for Aged Men, all located in Memphis, Tennessee, equally, share and share alike. This is a residuary bequest, however, and is not to infringe on any of the other legacies hereinbefore provided."

The question presented is the possibility of Mrs. Elizabeth Bate Williams necessity for encroachment on the corpus of this estate and thereby rendering it impossible to ascertain with reasonable certainty at this time the amount which will remain in the residuary estate for named charities.

The grounds for our protest and exceptions are as follows:

1. Mrs. Elizabeth Bate Williams, mother of deceased, now eighty-seven, with life expectancy of about three and one-half years.
2. She has no dependents—no close relatives.
3. Has an approximate $100,000.00 independent estate.
   (a) Large amount in cash in savings and bank accounts.
   (b) June 15, 1945, Mrs. Williams purchased from Executors of Estate property at 4547 Union Avenue, Memphis, Tennessee, paying $30,000.00 cash from her own estate, which nets her approximately $200.00 monthly income.

26 4. Owns her own home in Memphis; summer home, Monteagle, Tennessee.

5. Has own independent income of approximately $300.00 per month over and above and besides the $750.00 per month provided by the will.
6. In December, 1944, the estate paid Mrs. Williams in cash $16,500.00 in settlement of certain claims against the estate.
7. Her mode of living is simple and economical and in last two years her necessary expenses for her living and comfort have averaged considerably less than her monthly income under the will above.
8. No requests have been made to date on Executors for any additional amounts in this will for any purpose for over two years.
9. Monthly income of this estate, after providing $750.00 per month to Mrs. Williams, amounts to approximate-

ly $600.00 per month, which is accumulating for benefit of charitable residuary legatees.

10. Extremely remote possibility Mrs. Williams could ever need to request an encroachment on the estate due to her age, separate estate, mode of living, independent income, etc. Even if she should it is still discretionary with the Executors whether said request would be paid out of net excess monthly estate income before ever getting to the corpus.

We respectfully cite the following authorities as substantiating our contention:

The right to deduct charitable bequests is controlled by Section 303 (a) (3) of the Revenue Act of 1926, 26 U. S. C. A., Revenue Act of 1940, Section 812, subsection (d) as amended in 1942.

27 Supplementing and carrying this Revenue Act into effect the Treasury Department has issued certain regulations. See Article 44 and Article 47, Treasury Regulations 80, 1934 Ed.

These two regulations are set out in full in the case of *Meierhof v. Higgins*
129 Fed. (2) 1003.

The law on this subject has been discussed, cited and laid down in the following cases:

First National Bank v. Sneed
24 Fed. (2) 186.
Ithaca Trust Co. v. U. S.
279 U. S., 151, 73 Law Ed., 647, 49 Supreme Ct. 291.
Commissioner of Internal Revenue v. Bank of America
133 Fed. (2) 753.
First National Bank v. Sneed
24 Fed. (2), 186.
Hartford Conn. Trust Co. v. Eaton Col.
36 Fed. (2) 710.
Lucas v. Mercantile Trust Co.
43 Fed. (2) 39
Commissioner of Internal Revenue v. F. G. Bonfils Trust
115 Fed. (2), 788
Commissioner of Internal Revenue v. Bank of America, etc.
133 Fed. (2), 753
In re Bersall v. State
28 N. Y. Sup. 23

Another United States Supreme Court decision besides Ithaca Trust Company, *supra*, is

Merchants National Bank v. Commissioner of Internal Revenue
320 U. S., 256; 88 Law Ed., 55

The Trustees must exercise sound judgment and sound discretion, if they are to encroach on this estate, governed by the laws of Tennessee and not the Federal law.

28 *Smith v. Fleisch*
4th Tenn. App., 139
Vines v. Vines
143 Tenn., 317
Third National Bank v. Scribner
175 Tenn., 14
Lucas v. Mercantile Trust Co. (Supra)
Perry on Trusts, 7th Ed. Secs. 510-511 (a)
Hartford Conn. Trust Co. v. Eaton
36 Fed. (2), 710
Dana v. Dana
185 Mass., 156, 70 N. E. 49
Sparhawk v. Goldthwait
225 Mass., 414, 114 N. E., 718
Hawkins v. Graham
149 Mass., 284
Lovett v. Farnham
169 Mass., 1, 147 N. E., 246
Hall v. Carver
34 Conn., 403
Hooker v. Goodwin
91 Conn., 463, 99 Atl., 1059
Stroker v. Foster
60 N. E., 407
Farlin v. Sandburn
161 Mich., 615, 126 N. W., 634
Hoxie v. Finney
147 Mass., 616; 18 N. E., 593
Gammon v. Hassett (supra)

The United States Circuit Court of Appeals for the Fourth Circuit discusses the United States Supreme Court decision of Merchant National Bank *(supra)* in the case of *Commissioner of Internal Revenue v. Robertson's Estate et al*
141 Fed. (2), 855.

One of the most pertinent recent decisions in point on the question involved is

29 *Estate of Horace G. Wetherill, deceased (J. A. Cornett, Admr.)*

Horace G. Wetherill Trust (Crocker First National Bank of San Francisco; Board of Regents of University of Colorado 4 TC No. 79, January 31, 1945. Opinion by Van Fossan, Judge No. 6046, p. 11, Central Hanover Estate Bulletin, dated March 15th, 1945, Vol. VI, No. 3.

We respectfully request your careful reconsideration of this deficiency assessment and an abatement of this tax. If not, we request a hearing on this matter at your earliest convenience. We reserve the right to file any additional information or briefs on the subject.

Respectfully submitted

UNION PLANTERS NATIONAL BANK & TRUST COMPANY

By .....
Executor of Wm. Bate Williams Estate

.....
Sam P. Walker, Attorney,
Waring, Walker & Cox,
1905 Sterick Building

30 STATE OF TENNESSEE
COUNTY OF SHELBY

I, R. N. Lloyd, Jr., Trust Officer of Union Planters National Bank & Trust Company, who is one of the Executors and Trustees under the will of Wm. Bate Williams, make oath that the facts contained in the above protest and instrument are true to the best of my knowledge, information and belief.

Subscribed and sworn to before me,
this ..... day of September, 1945.

.....
Notary Public

My Commission expires .....

.....
R. N. Lloyd

31 *Exhibit "D"—Filed October 8, 1946*

(Filed Endorsement Omitted)

TREASURY DEPARTMENT
Washington 25
August 14, 1946

OFFICE OF
Commissioner of Internal Revenue
MT-ET-2945-Tennessee
Estate of—William Bate Williams
Date of death—July 22, 1943
Union Planters National Bank &
Trust Company, et al., Executors,
Memphis, Tennessee:

Gentlemen:

Reference is made to claim on Form 843 filed on April 18, 1946, for the refund of $35,899.12 Federal Estate tax paid in the above-named estate.

This claim seeks allowance as a deduction certain bequests to alleged exempt organizations aggregating $114,855.30. In the audit of the estate deduction was refused on the ground that by the terms of the trust agreement the trustees' power to invade corpus for the benefit of decedent's mother, Elizabeth B. Williams, is not restricted to a definite and fixed standard and that the relinquishment by Elizabeth B. Williams of her right to have the executors or trustees to "encroach upon the corpus for her benefit" was not timely made for Federal estate tax purposes.

The Federal estate tax return for the decedent's estate was due on October 22, 1944; it was filed on October 26, 1944.

Decedent's mother, the life beneficiary on Decem-
32 ber 10, 1944 attempted to renounce her right to have the executors and trustees invade the corpus of the trust for her benefit.

Section 812(d) of the Internal Revenue Code was amended by Section 408(a) of the Revenue Act of 1942, Title IV, Part I, enacted October 21, 1942, to read as follows:

"(a) Deduction in Case of Citizens and Residents:

The first sentence of Section 812(d) (relating to the deduction for charitable, etc., bequests) is amending by inserting after "The amount of all bequests, legacies, devises, or transfers" the following: "(including the interest which falls into any such bequest, legacy, devise,

or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, *of the disclaimer is made prior to the date prescribed for the filing of the* estate tax return) (italics added.)

This amendment was made applicable to estate of decedent's dying after February 10, 1939.

Item III of decedent's will provides in part:

"I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred and Fifty ($750.00) Dollars, each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose."

In Merchants National Bank of Boston v. Commissioner, 64 S. Ct. 108, November 15, 1943, estate of Ozro M. Field, the Court said:

"For a deduction under Section 303(a) (3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive, be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient.

(Cf. Humes v. United States, 276 U. S. 487, 494.)

Only where the conditions on which the extent of the invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the

burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. (Cf. Bank of America National Trust & Savings Assn. v. Commissioner, 126 Fed. (2d), 48 (C. C. A.)

It is the position of the Bureau that the disclaimer was not timely filed and furthermore that the purposes for which decedent's mother could and might desire to have the funds expended cannot be reliably determined and that no fixed standard governing the amount of funds her requirements might demand can be forecast with any degree of accuracy.

34 Under the circumstances and for the reasons set forth herein your claim for the refund of $35,899.12 filed on April 18, 1945, is rejected in its entirety.

Very truly yours,

JOSEPH D. NUNAN, JR.
Commissioner
By (Signed) D. S. BLISS
Deputy Commissioner

35 In the United States District Court

(Title Omitted)

(File Endorsement Omitted)

Amendment to Complaint—Filed November 5, 1946.

Comes the plaintiffs in the above styled cause and amend their complaint as follows:

Said complaint was filed in this Honorable Court on the morning of October 8th, 1946. Your plaintiffs now show that about the time this complaint was filed on said date the mother of the Deceased, towit: Elizabeth Bate

36 Williams, died in the City of Memphis; that under the will of the Deceased she was the sole beneficiary of the life estate and the trust created and set up in said will.

Your plaintiffs further show that the said life beneficiary, towit: Elizabeth Bate Williams, did not at any time during her life make any demand whatsoever on your plaintiffs as Executors of the Estate of William Bate Williams for any sums whatsoever in excess of the amount of $750.00 per month, which was paid her and which was provided for under the terms of said will.

Your plaintiffs further show that said sum was entirely sufficient to support the deceased's mother and that not

only did she not make any demand for additional sums, but she had no necessity whatsoever for any additional sums.

Therefore, your plaintiffs aver that the said Elizabeth Bate Williams did not at any time encroach upon the corpus of the estate.

Your plaintiffs on information and belief further aver that the allegations in the original complaint with reference to the individual or personal estate of Elizabeth Bate Williams are substantially correct and that the said Elizabeth Bate Williams left a substantial estate, which is now being administered through the Probate Court of Shelby County, Tennessee.

WHEREOF, your plaintiffs again ask a judgment against the defendant for the amount originally sued for.

SAM P. WALKER
D. T. PAGE
Attorneys for Union & Planters National Bank & Trust Company, and Milburn K. Noell, Executor of the Estate of William Bate Williams,
1905 Sterick Bldg.,
Memphis, Tennessee.

37

Duly sworn to by R. N. Lloyd.
Jurat omitted in printing. (All in italics.)

39 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Motion to Dismiss—Filed December 12, 1946.

Defendant moves the Court to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

HORACE FRIERSON
United States Attorney,
Attorney for Defendant
230 Custom House
Nashville 3, Tennessee

41 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Opinion—Filed August 12, 1947

This matter is before the Court upon motion of the defendant to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Plaintiff has sued defendant for the sum of $35,899.12 wrongfully collected by reason of a deficiency assessment against the estate of William Bate Williams, representing tax in the amount of $33,081.52 with interest in the amount of $2,817.60.

William Bate Williams, a resident of Shelby County, Tennessee, died testate on July 22, 1943. Plaintiff is the duly appointed and qualified executor of his last will and testament. Defendant is the Collector of Internal Revenue for the State of Tennessee.

42 The will directs that all of decedent's property be placed in trust to be administered for the use and benefit of the decedent's mother, Elizabeth Bate Williams, for and during her natural life. It directs the executors and trustees to pay to her the sum of $750.00 a month to be used by her as she sees fit, and in the event the income from the trust estate is not sufficient to pay the said sum of $750.00 each month, the executors and trustees are empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any property for that purpose. The will further provides:

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose."

Item VI of the will provides that after the death of the testator's mother, and after the payment of various specific bequests and legacies and all taxes and expenses, the balance is to be paid to four incorporated charities located in the city of Memphis, Tenaessee.

Plaintiffs respectfully show that in filing the Federal
culated the amount which would go to the charities to be
the sum of $121,869.20, which was deducted as a charitable
bequest.

On August 10, 1945, defendant disallowed the deduction
for the charitable bequests on the grounds that they had
no presently ascertainable value as of the date of the testa-
tor's death, and made a deficiency assessment against
43 the estate in the amount of $33,081.52, which was
paid, with interest.

At the time of the death of the testator, his mother was approximately eighty-five years of age. She died on October 8, 1946, at the age of eighty-eight. She had an independent estate of her own of the approximate value of $100,000.00, with an income of approximately $250.00 to $300.00 per month, in addition to the $750.00 per month provided in the will. In December, 1944, the executors paid her the sum of $16,500.00 in cash in settlement of a claim against the estate. She owned her own home in Memphis and a summer home at Monteagle, Tennessee, and had no dependents or close relatives.

The Court is of the opinion that the decision in this case is governed by the principles laid down by the Supreme Court in the case of Merchants National Bank of Boston, Executor, vs. Commissioner of Internal Revenue (320 U. S. 256), rather than the line of cases which have followed the decision of the Supreme Court in the case of Ithaca Trust Company vs. United States (279 U. S. 151), inasmuch as the case at bar does not have as strict limitations and standards imposed upon the trustee as in the Ithaca Trust Company case, the authority to encroach upon the corpus of the estate being unlimited, according to the desires of testator's mother for her pleasure, comfort and welfare, at her discretion, and no limitations or safeguards being set up in the interest of the charitable remaindermen.

The motion to dismiss is granted.

Judgment accordingly.

This 12th day of August, 1947.

ELMER D. DAVIES,
U. S. District Judge.

45 In the District Court of the United States
For the Middle District of Tennessee
Nashville Division

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, ET AL. EXECUTORS, ETC.,

Plaintiffs,
Civil No. 760

v.

LIPE HENSLEE, COLLECTOR, ETC.,

Defendant.

Order Sustaining Motion to Dismiss, Etc.—
Entered September 2, 1947

This cause came on to be heard upon the defendant's motion to dismiss the action because the complaint fails to state a claim against the defendant on which relief can be granted, when the plaintiffs offered to amend the complaint, which amendment the Court was pleased to allow. And after argument of counsel and due consideration of briefs filed on behalf of the parties, and the Court being of opinion for the reasons stated in its memorandum opinion filed herein on August 12, 1947, that the motion to dismiss is well taken;

It is therefore now adjudged and ordered by the Court that the defendant's motion to dismiss the action be and the same hereby is sustained, and the plaintiffs' action is accordingly dismissed, with prejudice.

46 It is further ordered by the Court that the plaintiffs pay all the costs of this cause, for which let execution issue.

To which the Plaintiffs except.

ENTER: Sept. 2, 1947

ELMER D. DAVIES,
U. S. District Judge.

O. K.

Ward Hudgins,
United States Attorney.

Sam P. Walker,
D. T. Page,
Attorneys for Plaintiffs.

47 In the United States District Court

(Title Omitted)

(File Endorsement Omitted)

Additional Amendment to Complaint—Filed September 2, 1947

Come your plaintiffs and leave of Court having been had, amend their complaint as follows:

Plaintiff respectfully show that in filing the Federal Estate Tax Return on the estate of William Bate Williams, your plaintiffs calculated that the amount which would go to the charities was the sum of $121,869.20, which was deducted as a charitable bequest, but that later the Field Agent of the Government reduced this amount to $114,855.30, to which latter figure your plaintiffs agreed.

48 Your plaintiffs now show, however, that both of said figures were incorrect and that the calculations were too low, although your plaintiffs used what is known as Greely's Formula, as set forth in the Regulations of the United States Treasury. In fact, upon the death of Mrs. Williams the actual amount, which was distributable to the said charities was the total sum of $143,515.12, which is approximately $29,000.00 more than originally estimated.

Your plaintiffs further aver that this excess amount very largely was due to the accumulation of income from the said estate over and above the $750.00 per month payable to the testator's mother, Mrs. Elizabeth Williams.

Your plaintiffs further aver that as stated in the original complaint the standard of estimating the amount due said charities was fixed and capable of being stated in definite terms of money and that there was no uncertainty appreciably greater than the general uncertainty that attends human affairs that there would ever be an encroachment upon the corpus of said estate.

Plaintiffs again aver even if the life beneficiary had made additional demands on your plaintiffs they would have had to exhaust the said amounts which had accumulated as a result of excess income before invading the corpus of the estate.

Your plaintiffs further show that if it was possible at the present time to amend the Federal Estate Tax Return the actual amount deductible is considerably in excess of the amount which was actually claimed as a deduction.

Your plaintiffs, therefore, ask the Court to take into consideration the facts set forth in this amended complaint, which have arisen since the death of the life beneficiary

and to take into consideration the exact figures herein set forth, which could not, of course, be calculated until the death of the life beneficiary.

49 Your plaintiffs show that the allegations in this amendment are evidential of the allegations in the original complaint, that at no time was there ever any possibility of invading the corpus of this estate.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Union Planters National Bank & Trust Company, and Milburn K. Noell, Executors of the Estate of William Bate Williams, 1903 Sterick Building, Memphis, Tennessee.

WARING, WALKER & COX,
Of Counsel.

Duly sworn to by R. N. Lloyd
jurat omitted in printing. (All in italics)

51 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Notice of Appeal—Filed September 15, 1947.

Come the Union Planters National Bank & Trust Company and Milburn K. Noell, Executors of the Last Will and Testament of William Bate Williams, and give notice to the defendant, Lipe Henslee, that they are hereby appealing from the final order of the Court entered in the above styled cause on the 2nd day of September, 1947, dismissing the original and amended complaints, and the plaintiffs herewith file their cost bond in the sum of $250.00.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Plaintiffs.

Notice of this appeal is hereby accepted, this 15th day of September, 1947.

WARD HUDGINS,
United States District Attorney
and Attorney for Defendant.

53 Bond on appeal for $250.00 approved and filed Sept. 15, 1947, omitted in printing.

55 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Designation of Record—Filed September 15, 1947.

The plaintiffs hereby designate to the Clerk of this Court to be forwarded to the Clerk of the Court of Appeals for the Sixth Circuit of Cincinnati, the following:

1. The original bill, together with all exhibits attached thereto.

2. An amendment to the original bill filed in this Court on or about November 1, 1946.

3. Motion to dismiss, filed by the defendant, Lipe Henslee, on December 12, 1946.

4. Order of this Court sustaining the motion to dismiss and dismissing the original complaint and all amendments; the Court in this order further allowing the plaintiffs to file an additional amendment.

56 5. Additional amendment filed by the plaintiffs on or about September 2, 1947.

6. Notice of appeal to the United States Circuit Court of Appeal at Cincinnati accepted by the defendant and filed on the 15th day of September, 1947.

7. Cost bond in the sum of $250.00, with the United States Fidelity & Guaranty Company, of Baltimore Maryland, Surety, filed on the 15th day of September, 1947.

8. Opinion of the Court, filed August 12, 1947.

9. Designation of Record.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Plaintiffs.

The foregoing designation of the record is accepted and approved by the United States District Attorney, as attorney for the defendant.

WARD HUDGINS.

57 Clerk's Certificate to foregoing transcript omitted in printing.

58 In the United States Circuit Court of Appeals
Sixth Circuit.

Cause Argued and Submitted—February 12, 1948.

(Before HICKS, SIMONS and MILLER, Circuit Judges.)

This cause is argued by Sam P. Walker for appellant and by Louise Foster for appellee and is submitted to the court.

In the United States Circuit Court of Appeals
Sixth Circuit.

Judgment—Filed March 15, 1948.

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

59 On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion herein.

61 In the United States Circuit Court of Appeals
Sixth Circuit.

No. 10576.

(File Endorsement Omitted)

UNION PLANTERS NATIONAL BANK, a Trust Company and National Bank at Memphis, Tennessee, and WILBURN K. NOELL, a resident citizen of Memphis, Tennessee, Executors of the Estate of WILLIAM BATE WILLIAMS, *Appellants*, v. LIPE HENSLEE, Individually, now residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, *Appellee*.	APPEAL from the United States District Court for the Middle District of Tennessee.

Opinion—Filed March 15, 1948.

Before HICKS, SIMONS and MILLER, Circuit Judges.

HICKS, Circuit Judge. Suit by the Executors of the Will of William Bate Williams to recover of the Collector of Internal Revenue for the District of Tennessee the sum of $35,899.12, with interest.

The court sustained defendant's motion to dismiss upon the ground that the complaint did not state a cause of action; hence this appeal.

No citation of authorities is needed to support the proposition that upon such a motion all allegations of fact, properly pleaded in the complaint and its amendments, must be taken as true and the motion to dismiss must be denied unless it clearly appears that the allegations of fact are insufficient to entitle the plaintiff to recover.

The facts as stated in the complaint and its amendments are as follows: William Bate Williams, a resident and citizen of Shelby County, Tennessee, died on July
62 22, 1943, leaving a Will of which the plaintiffs qualified as Executors. They, as such executors, made careful inventories and determined that the gross value of the estate was $508,411.17 and that the necessary expenses of administration would reduce this value to a net of $426,899.10. The will, filed as Exhibit A to the

complaint, made a number of specific bequests and contained a residuary clause directing the executors to pay the balance of the estate, when converted into cash, to, (1) The Mary Galloway Home for Aged Women; (2) The Crippled Children's Hospital School; (3) The Home for Incurables; and (4) The Sunshine Home for Aged Men. Each was a charitable institution qualified to take the bequest under the laws of Tennessee.

On October 26, 1944, appellants filed their Federal Estate Tax return which was due four days earlier. In the return they deducted the charitable bequests to the value of $121,869.20. The deductions were normally allowable under Sec. 303(a) (3) of the Revenue Act of 1926, 44 Stat. 9, as amended by Sec. 403(a) of the Revenue Act of 1934, 48 Stat. 680, if the amount of the deduction is "presently ascertainable." (Sec. 812(d) Internal Revenue Code. By the Regulations the deductions must be "ascertainable" at the time of the testator's death. Treas. Reg. 105, Sec. 81.44.

On March 9, 1945, the Collector made a deficiency assessment against the estate of $1,920.61, which was paid. On August 10, 1945, he made an additional assessment of $33,081.52, basing it upon the disallowance of the charitable bequests deducted in the return. On September 6, 1945, appellants protested this second deficiency assessment, which protest was overruled on September 26, 1945. The assessment, together with interest, was paid, and on April 18, 1946, appellants filed a claim for refund, which was denied on August 14, 1946. This suit to recover the amount of the second deficiency assessment tax, with interest, paid under protest, followed.

Our question is, whether the court erred in dismissing the complaint. We think it did. The District Court was of the opinion that the case as set forth in the complaint was governed by *Merchants National Bank of Boston, Executor, v. Commissioner of Internal Revenue*, 320 U. S. 256. It did not specifically say so, but necessarily must have concluded that the averments of the complaint failed to show that the deductions for the charitable bequests, if established, were ascertainable at the date of the testator's death, or, in other words, that the averments failed to show that the bequests to the mother would not encroach upon the corpus of the estate from which the charitable bequests would be paid.

63

In the *Merchants Bank* case, the court said, at page 261:

"For a deduction under § 303(a)(3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. Cf. *Humes* v. *United States*, 276 U. S. 487, 494. Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. Cf. *Bank of America Assn.* v. *Commissioner*, 126 F. 2d 48 (C. C. A.)."

This is the latest pronouncement of the Supreme Court and we are bound by it. It would serve no good purpose to attempt to differentiate it from the previous case of *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, which the opinion in the Merchants' Bank case recognized. It is enough to say that the Ithaca case is more nearly akin to our case.

The will was made Exhibit A to the complaint. The mother took a life estate only. The relevant portion thereof is found in Item 3, to wit:

"I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noell, and the Union Planters National Bank and Trust Company, as trustees, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred,

"I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her
64 as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, an-

thorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

. . . "

The appellants were not only executors but were trustees of the estate as well. They were given wide discretionary powers and it may be inferred that they were not only highly competent but well equipped for the discharge of their duties. The complaint indicates that the amounts of the charitable bequests, if they can be allowed at all were correctly set forth.

The complaint alleges certain facts which were "readily ascertainable" at the time of the testator's death. These alleged facts are in substance as follows:

Prior to the testator's death he lived with his mother in her home in Memphis and during the summer months in her home at Monteagle, Tennessee. At the time of the testator's death his mother was 85 years of age. She had no dependents or close relatives and was worth approximately $100,000.00 in her own right. She had a considerable income of her own and at her son's death made no request or demand of any character for additional sums over and above the $750.00 per month provided for her in the will nor expressed any "desire" for such. Her mode of living was simple and economical. Her actual living expenses had been considerably less than the monthly bequest.

We think that the mother's economical habits formed and maintained during her long life raises a presumption that they would continue and that this presumption was entitled to considerable weight by the court. It is
65 of course a disputable presumption but nothing appears in the complaint to rebut it.

In addition to the facts "readily ascertainable" at the time of the testator's death, the complaint avers certain

"reliably predictable" facts which turned out to be unerringly true. At the time of the testator's death his mother had a life expectancy of three years. She died at 88. Further, the complaint alleges that a reasonable survey of testator's estate at the time of his death showed that the income therefrom was producing and would produce in the future a very considerable excess in income over and above the $750.00 required to be paid monthly to the mother of testator. This prediction was conservative and according to the complaint turned out to be correct, since the executors had on hands at the time the suit was brought and after paying the $750.00 monthly bequest to the mother, more than $18,000.00 derived from income. These predictions, as to the life expectancy of testator's mother and the income the estate would produce, were something more than "rough guesses."

We think that the evidence as to what the estate would likely produce was relevant and should have been considered by the court for whatever it was worth in determining the reliability of the prediction at the time it was made.

The complaint further avers that the executors after carefully examining the facts immediately after the death of testator, concluded that there was no possibility that the life beneficiary would ever invade the corpus of the estate. This of course was a mixed question of law and fact.

Appellee insists that by the terms of testator's will the mother had the right, if she so desired, to take all of the estate and leave nothing for the charitable bequests. This contention is predicated upon the first and fourth clauses of Item 3. These clauses do not directly bequeath to the mother any part of the estate in addition to the $750.00 monthly bequest found in clause 2. Clause 1 does empower the trustees to administer the estate for the use and benefit of testator's mother for and during her natural life; and clause 4 directs that the executors and trustees manage and administer the estate so as to take care of and provide for the mother in such manner as she may desire. These clauses do not directly authorize the trustees to encroach upon the estate for this purpose and they must be read in connection with clause 37, which authorizes and em-
66 powers the executors and trustees to encroach upon the corpus of the estate for the pleasure, comfort and welfare of testator's mother only *in their discretion*. In this respect they differ from clause 2, which specifically

authorizes and empowers the executors and trustees to encroach upon the corpus to pay the $750.00 monthly bequest, and to sell any of the testator's property, real or personal, for this purpose.

We think that the conclusion of the executors and trustees, after an examination of the facts, actual and predictable, immediately after the death of testator, that there was no possibility that the mother would ever invade the corpus of the estate, might be regarded as a reasonable one. At least it should not have been regarded so unreasonable as to justify the dismissal of the case upon motion. There are borderline cases wherein deductions are allowed or disallowed, when tested by the formula in the Merchants Bank case. It will serve no good purpose to cite these cases since after all each case must stand or fall upon its own particular facts and circumstances. We have found no case wherein the question has been determined upon a motion to dismiss.

We think that the case requires a trial upon appropriate issues made up by the pleadings. We do not decide that appellants are entitled to recover, because that question is not before us. If, upon remand and trial the court should determine that appellants have not made out their case by the weight of the evidence, judgment for appellee would be indicated; but if the court should find that at the time of testator's death there was nothing more than a bare possibility, *i. e.*, a possibility so remote as to be negligible that the charitable bequests would fail, judgment for appellants would follow. *Commissioner* v. *Upjohn's Estate*, 124 Fed. (2d) 73, 76 (C. C. A. 6); *Commissioner* v. *F. G. Bonfils Trust*, 115 Fed. (2d) 788, 793 (C. C. A. 10); *Commissioner* v. *Robertson's Estate*, 141 Fed. (2d) 855, 858 (C. C. A. 4). The Robertson case cited and discussed the Merchants Bank case.

We are the better satisfied with the result arrived at because it tends to support Congressional policy toward charitable bequests.

The case is reversed and remanded for proceedings consistent herewith.

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Clerk's Certificate to foregoing transcript omitted in printing.

68 Supreme Court of the United States

Order Allowing Certiorari—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.